Dachau's 800-Pound Kangaroo (Court)

John Wear

The Dachau trial began on November 15, 1945 and ended four weeks later on December 13. All 40 of the defendants were convicted, with 36 being sentenced to death by hanging.[1] This article will examine whether the defendants at the Dachau trial received a fair hearing.

Unjustness of the Dachau Trials

The Dachau tribunal was composed of eight senior U.S. military officers with the rank of at least full colonel. The president of the court, Brig. Gen. John M. Lentz, was the former commanding general of the 3rd Army's 87th Infantry Division.[2] These U.S. military officers, with no formal legal training, were not qualified to objectively review the evidence presented in the trial.

William Denson, the chief prosecuting attorney, used a legal concept called "common design" for establishing that camp personnel at Dachau were guilty of violating the laws and usages of war. The Dachau tribunal accepted Denson's legal concept of common design. In common design, Denson exploited a legal concept broad enough to apply to everyone who had worked in Dachau.[3] In essence, every Dachau defendant was guilty unless proven innocent (a verdict most-unlikely to ensue).

The rules of evidence used at the Dachau trial were also atrociously lax. For example, hearsay evidence presented by the prosecution was routinely allowed by the "judges." Such testimony was permitted at the Dachau trials if it seemed "relevant to a reasonable man." This departure from normal Anglo-Saxon law was intended to compensate for the fact that some potential eyewitnesses had died in captivity.[4]

False witnesses were used at most of the American-run war-crimes trials at Dachau. Joseph Halow, a young U.S. court reporter at the Dachau trials in 1947, described some of the false witnesses at the Dachau trials:

[T]he major portion of the witnesses for the prosecution in the concentration-camp cases were what came to be known as "professional witnesses," and everyone working at Dachau regarded them as such. "Professional," since they were paid for each day they testified. In addition, they were provided free housing and food, at a time when these were often difficult to come by in Germany. Some of them stayed in Dachau for months, testifying in every one of the concentration-camp cases. In other words, these witnesses made their living testifying for the prosecution. Usually, they were former inmates from the camps, and their strong hatred of the Germans should, at the very least, have called their testimony into question.[5]

Stephen F. Pinter, an American lawyer who served as a U.S. Army prosecuting attorney at the American-run trials of Germans at Dachau, confirmed Halow's statement. In a 1960 affidavit Pinter said that "notoriously perjured witnesses" were used to convict Germans of false and unfounded crimes. Pinter stated, "Unfortunately, as a result of these miscarriages of justice, many innocent persons were convicted and some were executed."[6]

The use of false witnesses has also been acknowledged by Johann Neuhäusler, who was an ecclesiastical resistance fighter interned in two German concentration camps from 1941 to 1945. Neuhäusler stated that in some of the American-run trials "many of the witnesses, perhaps 90%, were paid professional witnesses with criminal records ranging from robbery to homosexuality."[7]

Lt. Col. Douglas T. Bates, the chief defense attorney, was also not permitted to fully cross-examine all of the prosecution witnesses. For example, prosecution witness Arthur Haulot, a 32-year-old journalist and former lieutenant in the Belgian army, threatened to leave the trial after being aggressively cross-examined by Bates. An hour later, Bates and the other defense lawyers met with Haulot outside of the courtroom. Bates put a friendly arm around Haulot's shoulder and said: "We just want to thank you. By speaking up, you got us properly scolded. We were doing what we had to do, and frankly it disgusted us. You won't be bothered like that again."[8]

Such a concession by the defense counsel could never have occurred if the trial had taken place in a court in America. However, at Dachau the defense attorneys were soldiers who took seriously reprimands from their superior officers, who were judges in the trial.[9]

Signed confessions by the defendants were often used to obtain convictions at the Dachau trial. Evidence was presented that many of the defendants in the Dachau trial made their confessions under torture. For example, defendant Johann Kick testified:

I was under arrest here in Dachau from sixth to 15th of May. During this time I was beaten all day and night. I had to stand at attention for hours. I had to kneel down on pointed objects. I had to stand under a lamp for hours and look into the light, at which time I was also beaten and kicked. As a result of this treatment my arm was paralyzed for about 10 weeks.[10]

Kick testified that as a result of these beatings, he signed the confession presented to him by U.S. Lt. Paul Guth.[11] Kick's report regarding his torture, however, made no difference to the eight U.S. military officers who presided as judges in the trial.

Common Design

The prosecution used the legal device of common design to establish that (wartime) camp personnel at Dachau were guilty of violating the laws and usages of war. Defense attorney Douglas Bates in his closing statement challenged the court's use of common design. Bates said:

The most talked-of phrase has been "common design." Let us be honest and admit that common design found its way into the judgment for the simple expedient of trying 40 defendants in one mass trial instead of having to try one each in 40 trials. Where is the common design? Conspicuous by its absence, established for the purpose of trapping some defendants against whom there was a shortage of proof—by arguing, for example, that if Schoep was a guard in the camp, then he was equally responsible for everything that went on. There are guards at each gate of this American post today. Is it not far-fetched

to say they are responsible for crimes that may be committed within the confines of this large area? If every one of the defendants is guilty of participating in that large common design, then it becomes necessary to hold responsible every member of the Nazi Party and every citizen of Germany who contributed to the waging of total war—and I submit that can't be done.

I read this in Life *magazine today: "Justice cannot be measured quantitatively. If the whole of Germany is guilty of murder, no doubt it would be just to exterminate the German people. The real problem is to know who is guilty of what." Perhaps the prosecution has arrived at a solution as to how an entire people can be indicted as an acting part of a mythical common design.*

And a new definition of murder has been introduced along with common design. This new principle of law says, "I am given food and told to feed these people. The food is inadequate. I feed them with it, and they die of starvation. I am guilty of murder." Germany was fighting a war she had lost six months before. All internal business had completely broken down. I presume people like Filleboeck and Wetzel should have reenacted the miracle at Galilee, where five loaves and fishes fed a multitude.

There has been a lot of impressive law read by the chief counsel, and it is good law—Miller, Wharton. The sad thing is that little of it is applicable to the facts in this case. Perhaps we have not been diligent enough in seeking applicable law. Some think the prosecution has found applicable law in the Rules of Land Warfare on the doctrine of superior orders. We have no intention of arguing that executions by the German Reich were due process. Nevertheless, we contend that executions were the result of law of the then recognized regime in Germany and that members of the firing squad were simple soldiers acting in the same capacity as in any military organization in the world….

If law cloaks a bloodbath in Germany, the idea of law will be the real victim. Lynch law, of which we have known a good deal in America, often gets the right man. But its aftermath is a contempt for the law, a contempt that breeds more criminals. It is far, far better that some guilty men escape than that the idea of law be endangered. In the long run, the idea of law is our best defense against Nazism in all its forms

*In closing, I ask permission to paraphrase a great statesman. Never in the history of judicial procedure has so much punishment been asked against so many on so little proof.**[12]***

Despite its injustice, William Denson refused to acknowledge that the legal concept of common design should not apply in this case. Denson stated: "I do not want the court to feel that it is necessary to establish individual acts of misconduct to show guilt or innocence. If he participated in this common design, as evidence has shown, it is sufficient to establish his guilt."**[13]**

The Case of Dr. Schilling

The injustice and hypocrisy of the Dachau trial is illustrated by the case of Dr. Klaus Karl Schilling (pictured at his execution). Malaria experiments at Dachau were performed by Dr. Schilling, who was an internationally famous parasitologist. Dr. Schilling was ordered by Heinrich Himmler in 1936 to conduct medical research at Dachau for the specific purpose of immunizing individuals against malaria. The medical supervisor at Dachau would select the people to be inoculated and then send this list of people to Berlin to be approved by a higher authority. Those who were chosen were then turned over to Dr. Schilling to conduct the medical experimentation.**[14]**

Dr. Schilling acknowledged in court that he had performed malaria experiments on inmates in Dachau. When asked why these experiments had not been performed on animals, Dr. Schilling replied:

*I have been asked hundreds of times why I do not work with animals. The simple answer is that malaria of the human being cannot be transmitted to animals. Even highly developed apes and chimpanzees are not receivers of malaria. That is a recognized principle of malaria experiments.**[15]***

William Denson stated that Dr. Schilling was "nothing more than a common murderer" whose medical experimentation could not be compared to that performed in the United States.**[16]**

However, evidence in the later Doctors' trial in Nuremberg showed that doctors in the United States performed medical experiments on prison inmates and conscientious objectors during the war. The evidence showed that large-scale malaria experiments were performed on 800 American prisoners, many of them black, from federal penitentiaries in Atlanta and state penitentiaries in Illinois and New Jersey. U.S. doctors conducted human experiments with *malaria tropica*, one of the most dangerous of the malaria strains, to aid the U.S. war effort in Southeast Asia.**[17]**

Although Dr. Schilling's malaria experiments were no more-dangerous or illegal than the malaria experiments performed by U.S. doctors, Dr. Schilling had to pay for his malaria experiments by being hanged to death while his wife watched.**[18]** The U.S. doctors who performed malaria experiments on humans were never charged with any crime.

Verdict

It took the Dachau tribunal only 90 minutes to convict all 40 defendants. Joshua Greene writes: "Even if history looked back and judged his work charitably, Denson might have imagined one hour and 30 minutes to be a shockingly short time in which to determine the fate of 40 men."**[19]**

William Denson had no doubt that the U.S. Army tribunal would find the German defendants guilty of war crimes.**[20]** The 90 minutes it took to convict the 40 defendants was also probably not a surprise to Denson. In fact, in the later Mauthausen trial in which Denson was the lead prosecutor, the American military tribunal took only 90 minutes to find all 61 defendants guilty.**[21]**

Historian Tomaz Jardim writes concerning these verdicts: "Given the brevity of deliberations, it is clear that the judges spent no significant amount of time reviewing the evidence, examining legal precedent, or evaluating the issues surrounding the common-design charge that defense counsel had raised. In all likelihood, the judges had begun deliberations with their minds made up."**[22]**

Conclusion

Benjamin Ferencz acknowledges the injustice of the Dachau trial:

*I was there for the liberation, as a sergeant in the Third Army, General Patton's Army, and my task was to collect camp records and witness testimony, which became the basis for prosecutions…But the Dachau trials were utterly contemptible. There was nothing resembling the rule of law. More like court-martials…It was not my idea of a judicial process. I mean, I was a young, idealistic Harvard law graduate.**[23]***

Ferencz states that nobody including himself protested against such procedures in the Dachau trials.**[24]**

The defendants did not receive a fair and impartial hearing in the Dachau trial. The use of interrogation methods designed to produce false confessions, lax rules of evidence and procedure, the presumption that the defendants were guilty unless proven innocent, American military judges with little or no legal training, unreliable eyewitness testimony, the nonexistence of an appeals process, and the inability of defense counsel to aggressively cross-examine some of the prosecution witnesses ensured the conviction of all of the defendants in the Dachau trial.

Endnotes

[1] Jaworski, Leon, *Confession and Avoidance: A Memoir*, Garden City, N.Y: Anchor Press/Doubleday, 1979, p. 115.

[2] Greene, Joshua M., *Justice at Dachau: The Trials of an American Prosecutor*, New York: Broadway Books, 2003, p. 41.

[3] *Ibid*., pp. 42-43.

[4] *Ibid*., pp. 47-48.

[5] Halow, Joseph, *Innocent at Dachau*, Newport Beach, Cal.: Institute for Historical Review, 1992, p. 61.

[6] Sworn and notarized statement by Stephen F. Pinter, Feb. 9, 1960. Facsimile in Erich Kern, ed., Verheimlichte Dokumente, Munich: 1988, p. 429.

[7] Frei, Norbert, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*, New York: Columbia University Press, 2002, pp. 110-111.

[8] Greene, Joshua M., *Justice at Dachau: The Trials of an American Prosecutor*, New York: Broadway Books, 2003, pp. 55-57.

[9] *Ibid*., p. 57.

[10] *Ibid*., p. 77.

[11] *Ibid*.

[12] *Ibid.* pp. 113-115.

[13] *Ibid*., p. 112.

[14] McCallum, John Dennis, *Crime Doctor*, Mercer Island, Wash.: The Writing Works, Inc., 1978, pp. 64-65.

[15] Greene, Joshua M., *Justice at Dachau: The Trials of an American Prosecutor*, New York: Broadway Books, 2003, p. 88.

[16] *Ibid*., p. 112.

[17] Schmidt, Ulf, *Karl Brandt: The Nazi Doctor*, New York: Continuum Books, 2007, p. 376.

[18] McCallum, John Dennis, *Crime Doctor*, Mercer Island, Wash.: The Writing Works, Inc., 1978, pp. 66-67.

[19] Greene, Joshua M., *Justice at Dachau: The Trials of an American Prosecutor*, New York: Broadway Books, 2003, p. 115.

[20] *Ibid*., p. 116.

[21] *Ibid*., p. 221.

[22] Jardim, Tomaz, *The Mauthausen Trial*, Cambridge, Mass.: Harvard University Press, 2012, pp. 180-181.

[23] Stuart, Heikelina Verrijn and Simons, Marlise, *The Prosecutor and the Judge*, Amsterdam: Amsterdam University Press, 2009, p. 17.

[24] *Ibid*.

Author(s):	**John Wear**
Title:	Dachau's 800-Pound Kangaroo (Court)
Sources:	*Inconvenient History*, Vol. 11, No. 2 (2019)
Dates:	published: 2019-04-29, first posted: 2019-04-30 02:59:16

http://inconvenienthistory.com/11/2/6702